

FILED

DISTRICT COURT OF GUAM

AUG 12 2005

MARY L.M. MORAN
CLERK OF COURT

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

JULIE BABAUTA SANTOS, *et al.*,
Petitioners,
vs.
FELIX A. CAMACHO, etc., *et al.*,
Respondents.

Civil Case No. 04-00006

ORDER RE: ATTORNEY
GENERAL'S MOTION TO
AMEND MARCH 2, 2005
ORDER

This matter comes before the Court on the Attorney General of Guam's Motion to Amend March 2, 2005 Order Denying Reconsideration of February 9, 2005 Order to Certify Interlocutory Appeal to the Court of Appeals for the Ninth Circuit.¹ After reviewing the parties' submissions, as well as relevant caselaw and authority, the Court hereby DENIES the Motion to Amend filed on March 11, 2005 and the Request for Certification of Interlocutory Appeal by the Attorney General. The Court sets forth the basis for its decision herein.

BACKGROUND

On January 25, 2005, the Magistrate Judge heard the following motions filed by the

¹Pursuant to Local Civil Rule 7.1(e)(3), this Court will dispense with oral argument and will decide the matter on the submitted briefs. Local Civ.R. 7.1(e)(3) states "[i]n cases where the parties have requested oral argument, such oral argument may be taken off calendar by Order of the Court, in the discretion of the Court, and a decision rendered on the basis of the written materials on file."

ORIGINAL

1 Attorney General of Guam ('Attorney General'):² (1) Motion to Strike Entry of Appearance of
2 Rawlen Mantanona and to Strike all Subsequent Documents Filed Herein by Rawlen MT
3 Mantanona³; (2) Motion to Strike Entry of Calvo & Clark, LLP & Purported Entry of
4 Appearance of Shannon Taitano, Esq. And to Strike all Subsequent Documents Filed Herein by
5 Calvo & Clark, LLP & Shannon Taitano, Esq.; and (3) Motion for Relief from Order Issued by
6 the Court on November 12, 2004.⁴ The Magistrate Judge issued his decision on February 9,
7 2005, denying the Attorney General's motions to strike the appearances of independent counsel
8 on behalf of the Governor of Guam and the Directors of the Departments of Administration and
9 Revenue & Taxation. On February 17, 2005, the Attorney General filed a Motion for
10 Reconsideration of the Court's February 9, 2005 Order. On March 2, 2005, the Magistrate
11 Judge issued an Order denying the Motion for Reconsideration. On March 11, 2005, the
12 Attorney General filed a "Motion to Amend the March 2, 2005 Order Denying Reconsideration
13 of February 9, 2005 Order to Certify Interlocutory Appeal to the Court of Appeals for the Ninth
14 Circuit" ("Motion to Amend").

15 On June 28, 2005, the Court held a Status Conference and discussed the Attorney
16 General's Motion to Amend. Specifically, the Court directed the Attorney General to clarify its
17 position with respect to how the Court should treat the motion. *See* Minutes dated June 28,
18 2005. On July 6, 2005, the Attorney General filed a Clarification of Attorney General's March
19 11, 2005 Motion to Amend March 2, 2005 Order Denying Reconsideration of February 9, 2005
20 Order to Certify Interlocutory Appeal to the Court of Appeals for the Ninth Circuit. The
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22 ²The Court also heard the Petitioner's Motion for Orders Approving the Administration Plan
23 and Amended Notice and for Orders Establishing the Fairness Hearing Date and Objection and Opt Out
24 Date. However, for purposes of this Order the ruling as to that matter has no bearing on the issues
discussed herein.

25 ³Counsel Mantanona represents Respondents, Art Illagan, Director of Department of Revenue
26 and Taxation and Lourdes M. Perez, Director of Department of Administration.

27 ⁴On November 12, 2004, the Court issued an order permitting the Governor of Guam to be
28 represented by counsel other than that of the Attorney General. Felix A. Camacho, was sued in his
official capacity as the Governor of Guam.

1 Attorney General suggested that the Court treat the Motion to Amend as an objection to the
2 Court's March 2, 2005 Order. In addition, the Attorney General requested the Magistrate Judge
3 to amend the March 2, 2005 Order to reflect "(a) that it is a proposed order, findings and
4 recommendation; and (b) that the proposed order of the Magistrate Judge include the
5 recommendation that regardless of how the District Court Judge rules on the objection, that the
6 issues be certified for interlocutory review as presented in the Attorney General's March 11,
7 2005 filing."

8 On July 11, 2005, the Magistrate Judge issued an Order denying the Attorney General's
9 request to amend the March 2, 2005 Order. The Magistrate Judge held that pursuant to General
10 Order 04-00016, the Magistrate Judge is authorized to "[h]ear and determine any pretrial
11 motions, including discovery motions, other than case-dispositive motions." General Order 04-
12 00016 at 3. The Magistrate Judge found that the question as to who is authorized under the
13 Organic Act to represent the respondents was a nondispositive issue. Accordingly, the
14 Magistrate Judge found that it was proper for him to have issued an Order concerning the
15 matter as opposed to a Report and Recommendation. Furthermore, the Magistrate Judge
16 declined to grant the Attorney General's request to recommend that the District Court certify
17 the issue for interlocutory review.

18 DISCUSSION

19 Under 28 U.S.C. § 636(b)(1)(A), a magistrate judge may "hear and determine any
20 pretrial matter pending before the court, except a motion for injunctive relief, for judgment on
21 the pleadings, for summary judgment, to dismiss or quash an indictment or information made
22 by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance
23 of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to
24 involuntarily dismiss an action." "Findings and Recommendations" are issued under 28 §
25 636(b)(1)(B) concerning matters specifically excepted under 28 § 636(b)(1)(A). In this
26 instance, the Magistrate Judge ruled on the issue of whether the Governor of Guam and the
27 Directors of the Departments of Administration and Revenue & Taxation could be represented
28 by counsel other than the Attorney General. The Court finds that this issue was clearly of a

1 pretrial nature and was not identified as a dispositive matter needing a judicial referral and a
2 Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(B).

3 Under Title 28 U.S.C. § 636(b)(1)(A) a district judge may reconsider a Magistrate
4 Judge's order on a nondispositive pretrial motion if the order was "clearly erroneous or contrary
5 to law;" it is not subject to *de novo* determination as are proposed findings and
6 recommendations under 28 U.S.C. § 636(b)(1)(B). Similarly, Federal Rules of Civil Procedure
7 72(a) provides "[t]he district judge . . . shall modify or set aside any portion of the magistrate
8 judge's order found to be clearly erroneous or contrary to law . . ." Under this standard of
9 review, the magistrate judge's order should be affirmed unless the district court is left with the
10 "definite and firm conviction that a mistake has been committed." *Burdick v. Comm'r*, 979 F.2d
11 1369, 1370 (9th Cir.1992). The reviewing court may not simply substitute its judgment for that
12 of the deciding court. *Grimes v. City & County of San Francisco*, 951 F.2d 236, 241 (9th
13 Cir.1991).

14 Relying upon 48 U.S.C. § 1412i(d)(2) for support, the Magistrate Judge held that the
15 express provisions of the Organic Act provided the Governor of Guam and those to whom he
16 delegated his authority the right to independent counsel in proceedings concerning the Guam
17 Territorial Tax. That provision provides:

18 **The Governor or his delegate shall have the same administrative and**
19 **enforcement powers and remedies with regard to the Guam Territorial**
20 **income tax as the Secretary of the Treasury, and other United States**
21 **officials of the executive branch**, have with respect to the United States income
22 tax. Needful rules and regulations not inconsistent with the regulations
23 prescribed under section 7654(e) of the Internal Revenue Code of 1986 [26
24 U.S.C.A. § 7654(e)] for enforcement of the Guam Territorial income tax shall
25 be prescribed by the Governor. The Governor or his delegate shall have
26 authority to issue, from time to time, in whole or in part, the text of the income-
27 tax laws in force in Guam pursuant to subsection (a) of this section.

28 48 U.S.C.A. § 1421i(d)(2) (emphasis added).

The Magistrate Judge found that since the Governor, not the Government of Guam, is
responsible for administering and enforcing the Guam Territorial income tax law, the Governor
has an interest in the outcome of the action; and that the Attorney General should not have the
authority to override the Governor's decisions as they relate to the Guam Territorial income tax

1 laws. *See* February 9, 2005 Order. After reviewing the record, this Court finds the Magistrate
2 Judge's factual findings were not clearly erroneous nor were his legal conclusions contrary to
3 law.

4 In addition, the Court denies the Attorney General's request to certify for interlocutory
5 appeal the issue of the Governor of Guam's right to independent counsel. The Attorney
6 General first raised certification as an issue in its March 11, 2005 pleading wherein the
7 Attorney General requested the Magistrate Judge to amend his March 2, 2005 Order to provide
8 a recommendation to the district court judge to certify the issue. Finding that the issue of
9 certification had not been previously raised by the Attorney General, the Magistrate Judge
10 determined that the matter was not properly before him and that he was without jurisdiction to
11 decide the question. Therefore, the Magistrate Judge directed the Clerk of Court to refer the
12 matter to the District Court Judge. *See* July 11, 2005 Order.

13 The certification for an order for interlocutory appeal is proper under section Title 28
14 U.S.C. §1292(b) provided: (1) it "involves a controlling question of law; (2) there is substantial
15 grounds for difference of opinion; and (3) an immediate appeal may materially advance the
16 ultimate termination of the litigation." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026
17 (9th Cir.1982). "[T]his section [is] to be used only in exceptional situations in which allowing
18 an interlocutory appeal would avoid protracted and expensive litigation." *Id.* The Attorney
19 General fails to meet the requirements under §1292(b).

20 The issue in question is collateral to the merits of the case as to whether or not the
21 petitioner and putative class are entitled to the tax relief they seek. The Court is not convinced
22 that the issue of whether the Governor of Guam may be represented by separate counsel is a
23 controlling question of law that will have bearing on the outcome of this matter. The Court
24 agrees with the Magistrate Judge that because the Governor of Guam is tasked with
25 administering the Guam Territorial Income Tax, he should have input in this action and be
26 represented by counsel of his choosing, particularly when there appears to be a conflict between
27 the policy objectives of the Attorney General compared to those of the Governor of Guam.
28 Additionally, this Court is not persuaded that certification would materially advance the

1 litigation. Presently a Settlement Agreement and a motion to certify the class have been filed.
2 A grant of certification at this point on a collateral matter will only stall the advance of this
3 litigation.

4 **CONCLUSION**

5 To the extent the motion to amend is viewed as an objection to the Magistrate Judge's
6 March 2, 2005 Order, the Court overrules the objection. The Magistrate Judge's factual
7 findings were neither clearly erroneous nor his legal conclusions contrary to law. In addition,
8 the Attorney General has failed to satisfy the requirements for certification of an interlocutory
9 appeal. Accordingly, the Court DENIES the relief sought by the Attorney General March 11,
10 2005 motion.

11 SO ORDERED this 12 day of August, 2005.

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14 CONSUELO B. MARSHAL*
15 UNITED STATES DISTRICT JUDGE
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27 *The Honorable Consuelo B. Marshal, United States Chief District Judge for Central District of
28 California, by designation.